

FINANCIAL INSTITUTIONS COMMITTEE
Business Law Section, State Bar of California
Committee Website -- Click [Here](#)

Minutes of the Meeting of November 14, 2006

Committee Members Present: Rosie Oda, Chair; Meg Troughton, Vice Chair; Bruce Belton, Secretary; Michael Abraham; Linda Iannone; Richard de la Pena; Andrew Druch; Elaine Lindenmayer; Teryl Murabayashi; Maureen Young; Keith Ungles; Todd Okun; and Joseph Sanchez.

Advisory Members and Others Present: Clay Coon; Jim Dyer; John Hancock; Eric Kawamura; Ted Kitada; Michael Occhiolini; Allan Ono; Jim Rockett; Neil Rubenstein; Kenneth Scott; Steven Takizawa; Gerry Tsai; Mike Ouimette; and Mary Price.

Committee Members Absent: Laura Dorman; Andy Erskine; Rob Hale; Randy Kennon; Mary Price; John Redmond; Russ Schrader; Brad Seiling; Will Stern; Bob Stumpf; Shirley Thompson; and Mike Zandpour.

Call to Order: Our Chair Rosie Oda of Pillsbury Winthrop Shaw Pittman LLP called the meeting to order at 9:35 a.m.

1. Roll Call and Introductions: Rosie welcomed the Committee Members and the Advisory Members and asked each person to identify themselves and where they worked.

2. Approval of October 10, 2006 Minutes: The Committee approved the minutes of the October 10, 2006 meeting.

3. Minutes and Internet Postings: Rosie introduced Bruce Belton, Tri Counties Bank, as Secretary for the 2006/2007 year. Bruce requested that presenters at Committee meetings please submit to him a one paragraph summary of their presentations by email (brucebelton@tcbk.com) prior to the meeting, if possible, to help him prepare the minutes. Bruce will post the minutes to the Committee's website each month. Bruce also noted that the subcommittee assignments on the Committee website were last updated in 2003.

4. Other Proposed Administrative Changes:

- a & b. One meeting in LA Per Year / LA Members to Attend Meeting in SF. Rosie proposed that we hold one Committee meeting per year in LA. She noted that the Corporations Committee alternated their meetings in northern and southern California requiring members to travel six times per year. She inquired whether some Banks or law firms might decline to pay for travel notwithstanding that serving on the committee can be good public relations for the employer. Rosie also noted that no-one was attending the video conference locations. The meeting could be held at an airport hotel to facilitate same day return air travel. Most Committee members commenting on this proposal were in favor of some meeting in the south and perhaps one meeting in SF as well. We will vote on this at the December meeting.

- c. Annual Requirement of 15 Minute Presentation from Each Member. Rosie requested that all members give a presentation at least annually. It is difficult to consistently schedule sufficient participation to fill every agenda. She suggested that this be a membership requirement and will offer this to a vote of the Committee at the December meeting. Presentations could be more than current events and include topics from those members who work in specialized areas and are willing to share their experience and knowledge with other members. Ted Kitada, Wells Fargo Bank, asked about the eligibility of MCLE credit for presenters and/or members attending the presentation (which would encourage both member attendance and presentations). Rosie will look into the question and what requirements are imposed for MCLE credit qualification.
- d. Photos and Bios on Committee website. Rosie requested that members please submit to her (rosie.oda@pillsburylaw.com) a photo and brief bio, one paragraph (but not a firm bio) to be placed on the Committee's website. An example can be viewed at the [ADR Committee Website](#).

5. Legislative Day in Sacramento: Rosie reported that the last Sacramento legislative day meeting was not well attended. At the next Sacramento meeting scheduled for February 13, 2007 there will be a new Commissioner for the Department of Financial Institutions which should be a draw for better member attendance. Maurine Padden of the CBA and Larry Doyle of the Bar also will make a presentation and will arrange appearances by legislators and staff. Rosie encouraged more members to attend. Unless we can improve attendance Maurine may decide it is not worth the effort to organize this event John Hancock reported that at times the date has been moved slightly to enable attendance of legislators. Lunch for attendees is provided and Northern California members can catch the same train to Sacramento.

6. Executive Committee Orientation:

- a. Future updates to mailing list. Rosie reported that changes made to a member's profile on the State Bar website should automatically update the FIC membership list, including email addresses.
- b. Constituency mailing list. Rosie also reported that we have access to a constituency mailing list consisting of more than 400 members. She will send out the minutes to that group to keep them better informed of Committee meetings and activities. She will send the constituency list to members to review and requests that it not be used for personal mailings. Rosie will also send the mailing list for Committee and Advisory Members to those groups.
- c. Other Committees of the Business Law Section. Rosie will also send out a list of other Bar Committees. She reported that there were committees whose activities could be of interest to our members, and vice-versa, e.g., the Corporate Law Department Committee. The Corporations Committee is the most active and produces a securities law manual that is revenue producing for the Bar. Bruce reported that many other Committees have "projects" that engage their members to produce a work product that could be used by other committees or members of the Business Law Section generally.

- d. Joint Committee meetings. Joint meetings are even possible and were suggested by the Executive Committee of the Business Law Section. Any members interested in becoming a liaison to another Committee should contact Rosie. A liaison would be required to attend two monthly meetings and report back to our Committee.
- e. Electronic and Internet advantages. We can prepare programs and have PowerPoint presentations available over the internet for members who are dialing into the meetings. Presenters should contact Susan Orloff of the Bar (Susan.Orloff@calbar.ca.gov) to make arrangements for this service.

7. Recap of Annual Bar Meeting “Hot Topics Presentation”: Meg Troughton, Vice Chair, will discuss this at the next meeting and Isabelle Ord was not available for today's meeting and will report on the last panel presentation at our next meeting at which time Meg will also discuss her proposal for next year.

8. Regulatory Relief Act: Maureen Young of Bingham McCutchen reported on the Financial Services Regulatory Relief Act of 2006 (S.2856). This is a regulator's bill, much of which expands the authority of regulators and grants them the ability to share information, decline to disclose certain supervisory information, and creates equal parity in enforcement authority. Maureen suggested that Committee members review a list of the Act's sections to determine which of those might be applicable to, or of interest to their clients. Maureen reported on the following sections:

- Section 607, the bank examination privilege provision confirms that if an institution provides information to its regulators, the institution has not waived its privilege. Institutions had requested this for some time to defend themselves against civil suits seeking information reported to regulators, in which it was claimed that the privilege had been waived. The related issue is once information is delivered to regulators, who owns the information? Regulators took position that only the regulatory agency has the ability to waive the privilege of non-disclosure. The statutory language supports this position. Related to this is release of Suspicious Activity Reports. The OCC took the position in BizCapital Bus. and Indus. Dev. Corp. v. Office of the Comptroller of the Currency (5th Cir. October 11, 2006) that the OCC should be prohibited from SAR disclosure, as are the reporting financial institutions. The court declined that request.
- Section 101 - Prior to Gramm-Leach-Bliley, Banks did not have to register as broker-dealers, while Thrifts did not enjoy this exception. This section is designed to facilitate what GLB intended by requiring the SEC to issue regulations with the Federal Reserve Board. The regulations are to be drafted within 180 days, but there is no deadline by which they must be finalized.
- Section 303 and 702 - Other pro-regulator provisions included expansion of the enforcement authority against Institution Affiliated Parties (IAPs). This bill expands the definition of IAPs to holding company level. This is probably the worst provision for the industry.
- Other provisions include: National Banks don't have to use cumulative voting; some leniency on the ability to pay dividends subject to certain caps; Thrifts got some relief on previously low lending limits for residential housing units; Federal Savings Banks got a provision which clarified that for purposes of diversity jurisdiction a savings bank is a citizen of the state where it has its main office; and a section permitting law enforcement to use third parties to enforce the Fair Debt Collection Practices Act.

(The Senate Committee on Banking, Housing and Urban Affairs section by section analysis of the Act is available [here](#).)

9. Talent Amendment to National Defense Authorization Act: Mike Ouimette of Pillsbury Winthrop Shaw Pittman reported as follows:

The John Warner National Defense Authorization Act for Fiscal Year 2007 was signed into law by President Bush in October 2006. This Act contains the so-called "[Talent Amendment](#)" sponsored by Sen. James Talent (R-MO) which will place restrictions on loans to members of the armed services and their dependents. The Talent Amendment went through Senate and House and armed services committees rather than banking committees. Under the Talent Amendment, creditors may not charge more than 36% annual interest rate to service members and dependents for certain loans. The Talent Amendment also contains written and oral disclosure requirements. Interest and all cost elements (fees, premiums, etc.) are included for purposes of calculating interest. The Talent Amendment does not apply to residential mortgages, car loans or loans to purchase personal property secured by the car or personal property. The Talent Amendment also prohibits the following practices:

- o Refinancing or consolidating consumer credit with the proceeds of other credit extended to the same covered member or dependent by the same creditor
- o Requiring borrower to waive any rights to legal recourse under state or federal law
- o Arbitration clauses
- o Unreasonable notice requirements for legal action
- o Using a check or other method to access an account of borrower or title of a vehicle as security
- o Requiring the borrower to establish an allotment to repay the debt
- o Prohibiting borrower from prepaying the debt or charging a prepayment fee or penalty

The Talent Amendment specifically preempts inconsistent state and federal laws, except to the extent such laws provide superior protection. It also prohibits states from authorizing creditors to charge covered members and dependents higher interest rates than the legal limit for state residents or permit violation or waiver of state consumer lending protections for covered members and dependents on the basis of nonresident or military status.

The Talent Amendment provides for fines and/or imprisonment for not more than one year for "knowing" violations by creditors. All rights of the borrower to legal recourse otherwise available under law are preserved, including consequential and punitive damages (i.e., may not be diminished by contract). Contracts in violation are void from the inception of the contract.

The Department of Defense is charged with prescribing regulations under the Talent Amendment which will, among other things, define what entities are subject to the Talent Amendment. The Department is directed to "consult" with the following federal agencies when prescribing regulations: FTC; Fed; OCC; FDIC; OTS; NCUA; and Treasury Department. This

law will become effective October 1, 2007 or such earlier date prescribed by the Secretary of Defense. The Secretary of Defense is also authorized to prescribe interim regulations.

10. OCC's ACH Risk Management Programs: Ted Kitada of Wells Fargo Bank reported on the OCC ACH Risk Management Program as follows:

The Office of the Comptroller of the Currency ("OCC") issued [OCC Bulletin 2006-39](#), dated September 1, 2006, providing guidance to national banks on managing risks of automated clearing house ("ACH") activity. National banks face a variety of risks when originating, receiving, or processing ACH transactions, or outsourcing these activities to a third party. The bulletin outlines the key components of an effective risk management program. The bulletin is a reference to enable national banks to develop a sound risk management program relative to ACH activities.

Using the bulletin as a guide, Wells Fargo Bank is developing an ACH risk management program. In that connection, Wells Fargo is developing information management tools to assess risks relative to common [standard entry class](#) ("SEC") codes originated by Wells Fargo on behalf of its customers, such as point of purchase ("POP") entries, accounts receivable conversion ("ARC") entries, and, effective March 16, 2007, back office conversion ("BOC") entries. This information gathering process includes the volume of such entries and the risks associated with such entries, such as the volume of entries returned as "unauthorized." Some entries, such as entries authorized over the Internet ("WEB" entries) and entries authorized over the telephone ("TEL" entries) may present more risks than other entries. This information gathering process not only provides a statistical overview of Wells Fargo's customer base engaged in ACH transactions, but also transaction risk experience relative to individual customers.

Further, inasmuch as Wells Fargo is an originator of ARC entries relative to its customers making payments to Wells Fargo, Wells Fargo is gathering information relating to such ARC entries to confirm that its risk experience is consistent with its overall customer base.

One shortcoming in the bulletin is its omission of risks relative to a bank's customer's compliance with recent changes to Regulation E, effective January 1, 2007, relating to electronic check conversion transactions. Such changes to Regulation E require that when a person uses information from a check to originate an electronic fund transfer, that person must secure the authorization of the check drawer/consumer. [NACHA](#) has adopted changes to its operating rules to conform to such Regulation E changes. While a bank is not directly liable under Regulation E if its customer fails to comply with Regulation E, it faces reputation risks due to such failures in providing the ACH service. Further, if the customer fails to comply with the conforming changes to the NACHA operating rules, the bank, as an originating depository financial institution, may confront a breach of warranty claim thereunder. The statute of limitations for such claims is governed by the applicable statute of limitations for breach of contract, which can be as long as seven years in some jurisdictions. [NACHA operating bulletin, dated March 28, 2003](#).

In summary, national banks are encouraged to review this bulletin and adopt a risk management program as required thereunder. Given the increasing volume of ACH activities by banks, such a program can serve as a significant risk mitigation tool. Further, such a program can be a key component of a payment risk program, to be adopted under OCC's [BC-235](#), dated May 10, 1989, to address risks associated with large dollar payments systems.

11. Report: Legislative Subcommittee Update: Bob Mulford and Bart Dzivi were unable to attend but will make their respective legislative reports at the next meeting.

12. Open Meeting, Other Items of Interest: Eric Kawamura, Citibank N.A. reported on the consolidation of Citibank regional banks into Citibank N.A. and a move of its principal offices to Las Vegas, NV. No other items were reported.

The meeting was adjourned at 11:15 am.

Next meeting: December 12, 2006.